

Jurisdiction of Georgian and EU Member States' Courts over Private International Maritime Litigations: Venue of Action



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I. Introduction

Private international litigations are one of the important aspects of maritime legal relations¹. The parties to marine contracts, as well as the persons otherwise connected with sea carriage process, frequently sue civil actions in several national courts with claiming the reparation for harm (damages) or fulfilling an obligation, from their contractors, also from persons in other form obliged before them (claimants). However, in such litigations the determination of which country's court has the jurisdiction to hear the dispute often is under active discussion. This is caused by the fact that those disputes have international character and involving cross-border elements between two or more states. Thus, the selecting of the correct country as the venue of action frequently becomes the subject to forum shopping or ambiguity between the litigant parties.

The same is with those maritime disputes which involve Georgian and simultaneously EU elements.² Such every specific case might be connected to Georgia and an EU Member State whether via the litigation parties (*in personam*) or via the subject matter (*in rem*) or via both. In the ongoing paper, it will be discussed the aspects of jurisdiction of Georgian and EU Member State's domestic courts when a concrete private maritime litigation is linked with Georgia and at the same time with an EU State. In particular, the answer will be searched to the next question: which connecting factors are necessary to be presented in a dispute derived in connection with maritime legal relations, in order that this dispute fell under jurisdiction of national courts of Georgia or of an EU State or of both? Furthermore, it should be noted that the paper will not review only cases when the litigation is raised between classical participants of marine carriage process, that is, charterers, carriers and consignee of goods, passengers, or the like. But it will also concern with the jurisdictional issues related to most of the other types of court disputes, such as, those engaging marine insurers, insured and assured persons, as well as shipowners, employers and ship employees, vessel fuel sales participants, etc. - the most of the companies and individuals somehow associated with private maritime legal relations.

¹ In the present paper, when mentioning the terms "maritime legal relations", "marine litigations", or the like, the words "maritime" and "marine" will be used only in the meaning of private law sense.

² In the present paper, when speaking on "EU element", it will be implied an element related to a Member State of the European Union.

The present thesis is designated for the practice lawyers, as well as for other persons, being interested or directly engaged in deciding venue of action of litigations that regarding. It should be admitted that the discussion of the given topic is much reasonable and the paper would be highly demanded.

The ongoing work is divided into chapters and sub-chapters. Each chapter concerns with the specific aspects of jurisdiction and solves one thematic problem. Relating to sub-chapters, they serve the resolution of sub-questions united under a chapter's theme. To the extent that the claims of the above-mentioned litigations are, as usual, linked whether to performance of lawful duties, or reparation from tortuous conducts, or to contractual obligations, to that extent it will be discussed the following three main themes: jurisdiction on claim requests on performing the lawful duties, venue of action derived from contractual relations and place of court proceedings on recovery of damages coming from tort (delict, quasi-delict).

The present paper will not discuss the questions when though the dispute at issue is somehow connected to Georgia or/and an EU State (for example, party to the dispute is national of the EU or Georgia), but venue of action is neither in Georgia nor in European Union but is in another world country. In other words, the discussions will be held from the angle - when do Georgian/EU States' domestic courts have jurisdiction over the litigations? And not from the point - which country's courts have jurisdiction? The reason of this exclusion from the thesis is that, if not so, it would have been necessary to review the national legislations on private international law of wide range of world countries, which would lead to overwhelming focusing on flow of laws and taken far away from the main topic.

The chapters of this thesis are arranged in the following manner:

First chapter deals with the scope of application of those international and national laws which can be used for determination of Georgian and EU States' domestic courts' jurisdiction over private maritime litigations.

Second chapter discusses the issue of Georgian and EU Member States' courts' jurisdiction on claims of requesting the performance of lawful obligations.

Third chapter concerns with venue of action matters in contract-based litigations.

And finally, the fourth chapter will concern with the jurisdictional aspects of the aforementioned countries' (Georgia, EU Member States) courts over tort-based claims of reparation.

II. Legal Sources and Methodology

In the present paper, it will be used the following legal sources:

- Law of Georgia on Private International Law³ (hereinafter “PIL Act”);
- Maritime Code of Georgia;⁴
- Constitution of Georgia;⁵
- Civil Code of Georgia;⁶
- Code of Civil Procedure of Georgia⁷ (hereinafter “CCP”);
- Tax Code of Georgia;⁸
- Law of Georgia on Normative Acts;⁹
- Law of Georgia on International Treaties;¹⁰
- Council Regulation (EC) No. 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and enforcement of Judgments in Civil and Commercial Matters (hereinafter “Brussels I”);
- Agreement of 19 October 2005 between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (hereinafter “EU-Denmark Agreement”);
- Treaty on European Union;
- Treaty on the Functioning of the European Union;
- United Nations Convention of 31 March 1978 on the Carriage of Goods by Sea¹¹ (hereinafter “Hamburg Rules”);
- Athens Convention of 13 December 1974 Relating to the Carriage of Passengers and their Luggage by Sea¹² as amended by Protocol of 19 November 1976 to

³ Act No. 1362, adopted on 29 April 1998, in force since 1 October 1998;

⁴ Act No. 715, adopted on 15 May 1997, in force since 1 July 1997;

⁵ Adopted on 24 August 1995;

⁶ Act No. 786, adopted on 26 June 1997, in force since 25 November 1997;

⁷ Act No. 1106, adopted on 14 November 1997, gradually fully entered into force;

⁸ Act No. 3591, adopted on 17 September 2010, in force since 1 January 2011;

⁹ Act No. 1876, 22 October 2009, gradually fully entered into force;

¹⁰ Act No. 934, adopted on 16 October 1997, fully entered into force on the day of its official publishing;

¹¹ in force since 1 November 1992, See:

http://www.uncitral.org/uncitral/en/uncitral_texts/transport_goods/Hamburg_rules.html

¹² in force since 28 April 1987, See:

<http://www.admiraltylawguide.com/conven/passengers1974.html>

the Athens Convention Relating to the Carriage of Passengers and their Luggage by Sea¹³ (hereinafter “PAL 1974” and “PAL PROT 1976”);

- Case law of the European Court of Justice (ECJ);
- European Commission Staff Working Paper, SEC(2010) 1548;
- BIMCO documents (sample copies of maritime contracts);
- Nordic Marine Insurance Plan of 2013;¹⁴

The method of research of the topic is based on legal analyzes of the afore-listed sources. In particular, the arguments are structured by the principle of generalization and analytical discussions of the laws as well as the other legal documents.

III. Text Material

¹³ in force since 30 April 1989, See:

<http://www.admiraltylawguide.com/conven/protopassengers1976.html>

¹⁴ Agreed between the Nordic Association of Marine Insurance (Cefor), the Danish Shipowners' Association, the Finnish Shipowners' Association, the Norwegian Shipowners' Association and the Swedish Shipowners' Association;

Chapter 1

Legal Bases of Georgian and EU Member States' Courts Jurisdiction over Private International Maritime Litigations: Ambit of Application

1.1 Importance of Clarifying of Applicable Law

In discussing the jurisdiction of Georgian and EU States' courts over maritime cases, it is very much significant to clarify the exact applicable norms determining such jurisdiction. This is especially important as the subject matter deals with the private international law and is not confined with only one state's domestic legislation. In the cases of aforesaid character, correct classification of the applicable laws is always one big step forward for resolving the final question. Else, the facing the serious threat of falling in maze of ambiguity of distinguished legislations and concurrent jurisdictions will be inevitable.

Hence, the present chapter will entirely be dedicated to analyses of which norms are relevant for deciding the Georgian and EU Member States' courts jurisdictions on actions of marine disputes involving Georgian and EU elements.

1.2 Georgian National Legislation

In Georgian domestic legislation, the norms applicable for the issue of Georgian courts' jurisdiction in private international litigations, and amongst them of maritime ones, can be found in three statutes as they are: Maritime Code of Georgia, Law of Georgia on Private International Law (PIL Act), and Code of Civil Procedure of Georgia (CCP).

The Maritime Code, in general, is the key statute for regulating the marine legal relations; however it does not provide the detailed clauses on jurisdiction. From that viewpoint, it only says:

“Economical litigations related to seafaring and involving foreign individuals or legal entities, by virtue of the agreement between parties, may be submitted for judging to foreign court or arbitration.”¹⁵

The code does not give the further detailing of jurisdictional issues, for instance, what is the issue when there is no “agreement between the parties” on action venue, or what are the terms and conditions the agreement on court jurisdiction must satisfy. All those answers can be found in PIL Act of Georgia. In particular, the norms on Georgian Courts’ international competence are provided in Chapter II of the PIL Act.

Regarding the hierarchical interdependence of Maritime Code and PIL Act, the former indirectly points that the primarily applicable source from Georgian legislation in considerations of international jurisdiction of Georgian courts in marine relations is to be PIL Act. This is true as from the following:

Maritime Code declares:

“[...] [The Maritime] Code is applied in nautical navigations¹⁶ [...] by a marine ship saved for a special law of Georgia or an international treaty is not applicable.”¹⁷

Clearly, “a special law of Georgia” which regulates Georgia’s courts’ international competence is Georgian PIL Act. Therefore, if spoken of Maritime Code’s reference to “a special law”, it should be implied a reference to PIL Act.

And finally, in the beginning of this sub-chapter, it was mentioned the Code of Civil Procedure of Georgia as one of the legal bases of Georgian courts’ international jurisdiction. The CCP provides:

¹⁵ See, Article 25, Maritime Code of Georgia;

¹⁶ The term “nautical navigations” is defined in Article 1 of Maritime Code of Georgia and implies “utilization of ships for carriage of passengers, cargo, luggage, post, [...] [and] for the purpose of towage and salvage operations and other economical, scientific and cultural goals.”

¹⁷ See, Article 2, Maritime Code of Georgia;

“[Georgian] courts can judge the cases derived from international contracts, as well as those of being participated by nationals of foreign countries, enterprises and organizations, also by the persons without nationality.”¹⁸

One way or another, likewise the Maritime Code, the CCP does not give more scrutiny on Georgian courts’ international competence.

To the end, in order to determine Georgian courts’ jurisdiction over private international litigations, and amongst them, over those have been raised in connection with marine relations, the PIL Act of Georgia comes as main ground among Georgian domestic legislation.

1.3 EU Law

1.3.1 EU Legislation

On the EU level, the applicable act for regulating of private international maritime jurisdiction of the EU Member States’ domestic courts is Brussels I.

Brussels I applies in civil and commercial matters whatever nature of the court or tribunal, excluding arbitration and excepting: revenue, administrative and matrimonial matters; the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills and succession; bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings; and social security.¹⁹ Clearly, the marine sphere comes into ambit of it.

Brussels I Regulation came into force on 1 March 2002 and since the time it has been binding in its entirety, as well as directly applicable, in all of the EU Member States.²⁰ The only Member, which acceded later, was Denmark. On 19 October 2005, Denmark

¹⁸ See, Article 11(4), Code of Civil Procedure of Georgia;

¹⁹ See, Article 1(1), 1(2), Brussels I Regulation; See also, *ibid*, Recital 7 and 20;

²⁰ See, Article 76, Brussels I Regulation; See also, *ibid*, Recital 6;

concluded the agreement with the European Community and accepted Brussels I.²¹ The Agreement came into effect on 1 July 2007.²² Though, under that agreement, Denmark made some reservations to the application of several norms of the Regulation, nevertheless, they are not in concern with the topic of this paper.

Here, one may ask: Is Brussels I applicable only for EU nationals and companies or is it also relevant for regulating the relations involving third country persons and amongst them the Georgian ones? The answer on this question is as follow:

The European Commission in the Proposal for the Brussels I Regulation declared:

*“The specific objective [of the operation of Brussels I in the international legal order] is to improve access to justice, legal certainty, and protection of EU citizens and companies **in disputes connected with third States**.”*²³

Also,

*“[...] the introduction of a forum geared specifically **at non-EU defendants** would improve access to justice for companies from those Member States which currently do not have comparable provisions in their national law.”*²⁴

Obviously, as it is derived from the foregoing that, in terms of jurisdictional issues, Brussels I is applied also in the cases where a party to the dispute is not the national of/registered in the European Union. This is further proved from the ECJ judgments on separate articles of the Regulation (see, below). However, in order that the Regulation were

²¹ See, Article 2(1), EU-Denmark Agreement;

²² See, Article 12(2), EU-Denmark Agreement; See also, ‘Information concerning the date of entry into force of the Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters’, Official Journal of the European Union, 4 April 2007, L 94/70;

²³ See, European Commission, Commission Staff Working Paper, SEC(2010) 1548, Brussels, 14 December 2010, paragraph 2.2.2 and heading of paragraph 2.2;

²⁴ See, European Commission, Commission Staff Working Paper, SEC(2010) 1548, Brussels, 14 December 2010, paragraph 2.2.4(b)(iii);

applicable, in any case, it is crucially necessary that the dispute party had the specific connection to an EU Member State or the litigation in question were, to some extent, related to a Member State. The cases of such connection, as provided in the Regulation, might be, for example: when the place of domicile of the party to a dispute is in a Member State,²⁵ or, for instance, when the venue of performance of the contract giving rise to litigation is in a Member State.²⁶ As a rule, the provisions of jurisdiction laid down by Brussels I are founded on the principle that jurisdiction is generally based on the defendant's domicile (*forum domicili*), but complemented and derogated by the rules of special jurisdiction.²⁷ All those and other cases of the mentioned connections will be detailed reviewed during the discussions in the ongoing paper.

To this end, Brussels I Regulation is to be regarded as the principal legal basis, among the EU legislation, for deciding the EU countries' courts jurisdiction over maritime disputes involving foreign elements linked to Georgia.

1.3.2 ECJ Case Law

The purpose of Brussels I Regulation is to set the common and solid rules on jurisdiction for the EU Member States courts, in order to avoid the ambiguity in venue of claim choice for litigants, and concurrent jurisdiction among courts. This is more clearly enunciated in case law of the European Court of Justice:

“[...] [Brussels I Regulation] seeks to unify the rules of conflict of jurisdiction in civil and commercial matters by way of rules of jurisdiction which are highly predictable. [...] Accordingly, Regulation [...] pursues an objective of legal certainty which consists in strengthening the legal protection of persons established in the European Community [European Union], by enabling the applicant to identify easily the court in which he

²⁵ See, for example, Article 2(1), Brussels I Regulation;

²⁶ See, for example, Article 5(1), Brussels I Regulation;

²⁷ See, ECJ Judgment on Case C-103/05, 13 July 2006, paragraph 22; See also, ECJ judgment on Case C-386/05, 3 May 2007, paragraph 21; See also, ECJ Judgment on Case C-533/07, 23 April 2009, paragraph 23; See also, Recital 11, Brussels I Regulation;

may sue and the defendant reasonably to foresee before which court he may be sued [...].”²⁸

Besides, in relation to “special jurisdiction rules” the Court held:

“[...] The special rules on jurisdiction [are required to be] interpreted in such a way as to enable a normally well-informed defendant reasonably to foresee before which courts, other than those of the State in which he is domiciled, he may be sued.”²⁹

Obviously, for applying of any legal norm, one of the key issues always is how that norm is interpreted. In other words, it is almost impossible to rely on a norm if the true meaning and essence of it is misunderstood. That principle operates also, as it is derived from above, with Brussels I in deciding the jurisdictional questions of EU Member States’ courts. The main body in EU, which interprets the Union law, is the European Court of Justice. One of the functions of ECJ is to give preliminary rulings on the interpretation of Union law.³⁰ In interpreting the European Union law, and amongst them the Brussels I Regulation, the ECJ considers not only the wording of the law in question, but also the context in which it occurs and the objectives pursued by the rules of which it is part.³¹

Therefore, the ECJ case law on Brussels I Regulation has much relevance and significance in defining the venue of action in several situations being discussed in this paper.

²⁸ See, ECJ Judgment on Case C-533/07, 23 April 2009, paragraphs 21 and 22; See also, ECJ Judgment on Case C-386/05, 3 May 2007, paragraphs 19 and 20; See also, Recitals 2 and 11, Brussels I Regulation;

²⁹ See, ECJ Judgment on Case C-103/05, 13 July 2006, paragraph 25;

³⁰ See, Article 19(3)(b), Treaty on European Union; See also, Article 267, Treaty on the Functioning of the European Union;

³¹ See, ECJ Judgment on Case C-533/08, 4 May 2010, paragraph 44; See also, ECJ Judgment on Case 292/82, 17 November 1983, paragraph 12; See also, ECJ Judgment on Case C-136/91, 1 April 1993, paragraph 11; See also, ECJ Judgment on Case C-223/98, 14 October 1999, paragraph 23; See also, ECJ Judgment on Case C-301/98, 18 May 2000, paragraph 21; See also, ECJ Judgment on Case C-156/98, 19 September 2000, paragraph 50; See also, ECJ Judgment on Case C-53/05, 6 July 2006, paragraph 20; See also, ECJ Judgment on Case C-300/05, 23 November 2006, paragraph 15; See also, ECJ Judgment on Case C-306/05, 7 December 2007, paragraph 34; See also, ECJ Judgment on Case C-298/07, 16 October 2008, paragraph 15; See also, ECJ Judgment on Case C-466/07, 12 February 2009, paragraph 37; See also, ECJ Judgment on Case C-301/08, 22 October 2009, paragraph 39; See also, ECJ Judgment on Joined Cases C-402/07 and C-432/07, 19 November 2009, paragraph 41; See also, ECJ Judgment on Case C-403/09 PPU, 23 December 2009, paragraph 33; See also, ECJ Judgment on Case C-162/09, 7 October 2010, paragraph 49;

The important factor has the case law of the European Court of Justice passed also in relation to Brussels Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (hereinafter “Brussels Convention”). It is true that Brussels Convention itself is not applicable in jurisdictional issues for Georgian courts, because Georgia is not a party to it (Convention), however, here it is considerable the factor of influence of ECJ rulings’ for Convention, on Brussels I Regulation, as follow:

*“[...] In so far as Regulation No 44/2001 replaces the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters [...] interpretation provided by the Court in respect of the provisions of the Brussels Convention is also valid for those of Regulation No 44/2001 whenever the provisions of those instruments may be regarded as equivalent [...]”.*³²

Consequently, ECJ judgments interpreting Brussels Convention, in some occasions and in particular, where the Convention and Regulation are equivalent, are means of interpretation also for Brussels I and thus are, in many cases, relevant for determining the place of private marine claims involving EU and Georgian elements.

1.4 International Treaties

International treaties providing jurisdictional aspects in private international maritime litigations and, simultaneously, being in force for Georgia are: Hamburg Rules³³ and PAL 1974³⁴ (as amended by PAL PROT 1976³⁵).

³² See, ECJ Judgment on Case C-533/08, 4 May 2010, paragraph 36; See also, ECJ Judgment on Case C-189/08, 16 July 2009, paragraph 18; See also, ECJ Judgment on Case C-180/06, 14 May 2009, paragraph 41;

³³ For Georgia in force since 1 April 1997, for the status see:

http://www.uncitral.org/uncitral/en/uncitral_texts/transport_goods/Hamburg_status.html

For the status see also:

<http://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20XI/XI-D-3.en.pdf>

³⁴ For Georgia in force since 23 November 1995, for the status see page 304 at:

<http://www.imo.org/about/conventions/statusofconventions/documents/status%20-%202012.pdf>

³⁵ For Georgia in force since 23 November 1995, for the status see page 308 at:

<http://www.imo.org/about/conventions/statusofconventions/documents/status%20-%202012.pdf>

Hamburg Rules and PAL 1974 design partly distinguished from PIL Act of Georgia rules on court jurisdiction. That is to say, in some occasions, they match with PIL Act's considerations, whereas, in some cases, they "throw" those certain litigations into Georgian courts' jurisdictional area, which are not so provided by PIL Act (see, below). Respectively, in this connection, the reasonable question can be raised: what is the place of international treaties and among them that of Hamburg Rules and PAL 1974 in the legislative system of Georgia, and how those treaties influence on Georgian courts while setting the jurisdiction on every concrete maritime claim? That question can be answered in the following manner:

Above, in Chapter 1.2, it was discussed the reference of Georgian Maritime Code to PIL Act, the latter as the preferential over the former. In the same reference, attention is drawn also on the international treaties contracted by Georgia and it is provided that as well as such treaties have the preference in relation to Maritime Code.³⁶ This is further proved from another declaration of Maritime Code:

*"If an international treaty or convention, Georgia is a party to, provides a distinguished rule other than [the Maritime] Code [of Georgia], such treaty or convention is applied."*³⁷

Moreover, the Code specially refers to Hamburg Rules and declares:

*"[...] in Georgia it is applied United Nations Convention of 1978 on the Carriage of Goods by Sea (the "Hamburg Rules")."*³⁸

Indeed, in Georgia's legal system, the international conventions and treaties binding Georgia are directly and hierarchically primarily applicable than the national legislation.

In other words, Georgia, in terms of implementation of international law, is a monist state and the international norms are directly enforceable in the country. From that viewpoint, the Law of Georgia on International Treaties provides:

³⁶ See, above, Chapter 1.2, discussion on Article 2 of Maritime Code of Georgia;

³⁷ See, Article 26, Maritime Code of Georgia;

³⁸ See, Article 114(3), Maritime Code of Georgia;

“An international treaty, Georgia is a party to, is an inseparable part of Georgian legislation. [...] Officially published provisions of an international treaty Georgia is a party to, which set forth exact rights and obligations and do not need more specifying by adopting a national law, directly operate in Georgia.”³⁹

Besides, the Constitution of Georgia and Law of Georgia on Normative Acts declare:

“[...] an international treaty or an international agreement, Georgia is a party to, unless it is in conformity with the Constitution of Georgia, with an Amending Act of the Constitution or with a Constitutional Agreement, is primary over the national normative acts.”⁴⁰

Furthermore, the PIL Act holds:

“Rules provided in international treaties have the primary force over the rules designed by [the PIL Act of Georgia].”⁴¹ (Certainly, in the words “international treaties”, under this norm of PIL Act, is implied only those international treaties by which Georgia is bound and not abstractly all the inter-state treaties around the world).

Therefore, from all the foregoing, the Hamburg Rules and PAL 1974 are directly and preferentially applicable for Georgian courts in accepting the jurisdiction on claims taken by litigation parties on reliance of those two conventions.

There is also another question: does the fact of preference of Hamburg Rules and PAL 1974 over PIL Act of Georgia imply that, in deciding the issues, only the Hamburg

³⁹ See, Articles 6(1) and 6(3), Law of Georgia on International Treaties;

⁴⁰ See, Article 7(5), Law of Georgia on Normative Acts; See also, *ibid*, Articles 3(4) and 7(3); See also, Article 6(2), Constitution of Georgia; See also, Article 6(2), Law of Georgia on International Treaties;

⁴¹ See, Article 2, PIL Act of Georgia;

Rules and PAL 1974 are applicable and PIL Act should be disregarded? This question should be explained in the following way:

In some occasions the mentioned conventions and PIL Act give the similar provisions whereas in other cases they fill each other. That is to say, they (the conventions and PIL Act) do not come into incompliance with one to another and do not set the concurrent jurisdictional rules. The only fact that the wordings of those international and domestic documents are different does not give the ground for negligence of applicability either the former or the latter. Consequently, a claimant in every concrete situation (in deciding the venue of action derived from marine relations) may rely as on the conventions as on the PIL Act as on both.

With respect to EU Member States as bound by the Hamburg Rules and PAL 1974, they are:

- Hamburg Rules: entered into force for Czech Republic, Hungary and Romania.⁴²
- PAL 1974: is binding for Belgium, Estonia, Greece, Ireland, Latvia, Luxemburg, Poland, Spain and the United Kingdom;⁴³ (Those countries are bound also by PAL PROT 1976 and, thus, the amendments taken by PAL PROT 1976 to PAL 1974 are in force for them as well⁴⁴).

Here, one may ask: In deciding the claim place, can the courts of the above-referred EU Member States be guided by the aforesaid conventions or they, in any case, are bound only by the Brussels I Regulation?

Brussels I Regulation does not preclude EU Members, in the relations with non-EU countries, from applying the rules laid down by the specific international treaties (and

⁴² See:

http://www.uncitral.org/uncitral/en/uncitral_texts/transport_goods/Hamburg_status.html

See also:

<http://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20XI/XI-D-3.en.pdf>

⁴³ See, page 304 at:

<http://www.imo.org/about/conventions/statusofconventions/documents/status%20-%202012.pdf>

⁴⁴ See, page 308 at:

<http://www.imo.org/about/conventions/statusofconventions/documents/status%20-%202012.pdf>

among them the Hamburg Rules and PAL 1974), while a question is being raised to determining the court jurisdiction. In particular, the Regulation says:

“[...] [Brussels I] shall not affect any conventions to which the Member States are parties and which in relation to particular matters, govern jurisdiction or the recognition or enforcement of judgments. [...] [This] shall be applied in the following manner: [...] [Brussels I] Regulation shall not prevent a court of a Member State, which is a party to a convention on a particular matter, from assuming jurisdiction in accordance with that convention, even where the defendant is domiciled in another Member State which is not a party to that convention.”⁴⁵

At the same time, the aforesaid provision of the Regulation is interpreted in such a way that “in relation to matters governed by specialised conventions, for the application of those conventions, the fact remains that their application cannot compromise the principles which underlie judicial cooperation in civil and commercial matters in the European Union, such as the principles [...] of free movement of judgments in civil and commercial matters, predictability as to the courts having jurisdiction and therefore legal certainty for litigants, sound administration of justice, minimisation of the risk of concurrent proceedings, and mutual trust in the administration of justice in the European Union.”⁴⁶

In connection to Hamburg Rules and PAL 1974, it is difficult to say whether they compromise the principles of predictability, sound administration of justice, etc. counted in the above-pointed ECJ judgment. With this respect the European Court of Justice has not tested those conventions. In the future they may become under the considerations of the Court, however, until now, it should be supposed that Hamburg Rules and PAL 1974 are in full compliance with the said principles and they may be freely applied by the domestic courts of those EU States for which they are in force.

⁴⁵ See, Article 71(1) and 71(2)(a), Brussels I Regulation; See also, *ibid*, Recital 25;

⁴⁶ See, ECJ Judgment on Case C-533/08, 4 May 2010, paragraph 49;

To the end, the international treaties, in particular Hamburg Rules and PAL 1974 giving their own aspects (those aspects in details will be reviewed below) of jurisdiction in certain private maritime international litigations, are applicable for Georgian and to-them-contracting EU Member States courts, together with respectively Georgian national legislation and Brussels I Regulation.

Chapter 2

Jurisdiction on Claims with Request of Performing of Lawful Obligations

2.1 Concept of Claim on Performance of Lawful Obligation

Before starting the discussions on issues of jurisdiction on marine litigations with a claim of request on performance of lawful obligations, it is to be explained the concept of “lawful obligation” and “claim with requesting of its performance”.

In maritime law and marine carriage world practice, there are a lot of normative documents which grant the participants of legal relations several rights and obligations. Sometimes those documents have domestic legislative character whereas in other occasions they might be international treaties, conventions, etc. Clearly, in the concept of “lawful obligation” it should be implied exactly the obligations which flow from such legal acts of mandatory nature and are conferred to the parties of a marine legal relations by the force of law and not, for example, of a contract. Correspondingly, the request of performance of a lawful obligation is to have meaning that the claim at issue is aiming to, by the force of the court judgment, compelling a defendant to act in compliance with its (maritime) lawful obligation (for instance, to bring cargo in another port, because law requires that he must act so in case of claimant’s wish); in other words the claim in question is not purposing (seeking) to make defendant fulfill a contract or pay recoveries resulted from tort or because of the breach of contract or of law.

It should be also noted that in several marine relations (for example, in carriage of general cargo) when parties make an agreement and conclude a contract, sometimes such a contract (for instance, some bill of lading contracts) does not have a written form and the provisions of it are not declared on a paper. But the detailed regulations of such a contractual relation, as a rule, are contained in domestic or international legal acts, as well as derive from the trade customs applied on the concrete territorial area. Respectively, here it is raised a question: are the claims of performance of such contracts whether a claim of performance of lawful obligation or claim on fulfillment of contractual one? The answer is not simple; thought, to the opinion of the author of this thesis, the mentioned claims should be equalized to the claims on performance of lawful obligations. The argument of that is that: in the given situations the focus should be drawn on the source of the obligation at issue and not on the formal side of the parties’ legal relation. It is true that here the persons have a contractual deal, but the detailed provisions of such deal come from a law and not

from a contract. Consequently, the given claims should be considered to be raised in connection with fulfillment of lawful duties and not of contractual obligations.

And finally, one may ask: in “lawful obligations” is it implied only duties coming from mandatory laws or as well as the obligations flowing from the marine trade customs and practice? The approach of the author of the ongoing paper is that: if the duty has mandatory character than it should be regarded as lawful obligation despite the fact that it is based on custom. This is true because in such occasion it must be decisive not the technical name of the source (law, custom) of the duty, but the obligatory essence of the given source. However, the determination of the mandatory nature of each concrete obligation should always be the subject of factual assessment in every specific situation.

To this end, in this chapter, in the concept of “lawful obligation” it should be meant all kinds of duties which are “fed” by the national or international mandatory maritime laws or customs, but not by provisions of a contract. Respectively, in “the jurisdiction on claims requesting the performance of lawful obligations” it is to be implied the jurisdictional aspects on those court actions where the claimant requests that the defendant fulfill that lawful obligation of him (of defendant) which derives from a specific maritime domestic or international law or custom.

2.2 Jurisdiction of Georgian Courts under Georgian National Legislation

As it is pointed above, in Chapter 1, venue of action at Georgian courts, of litigations derived from private international maritime relations (and among the claims with request of performing of marine lawful obligations), must be determined by the PIL Act of Georgia and, in several occasions, by Hamburg Rules and PAL 1974. In this sub-chapter, the discussions will be held from the angle of PIL Act, and Hamburg Rules and PAL 1974 will be subjects of considerations of Chapters 2.4 and 2.5.

PIL Act of Georgia provides:

“Georgian courts have international jurisdiction, if the defendant is domiciled or has place of residence or habitual placement in Georgia.”⁴⁷

That provision applies to not only the actions with claiming the performance of lawful duties, but also to disputes originated from contractual obligations or tortuous conducts.

Here, a question is to be raised: what does it imply in terms: defendant’s “place of domicile”, “place of residence” and “habitual placement”?

In this regard, Georgian national legislation does not give the clear answer, but it defines the alike terms (more or less being close to the aforesaid terms of PIL Act), that is: “place of domicile of an individual”, “factual placement of an individual” and “place of residence of a legal entity”.

Under the Civil Code of Georgia:

“A place of domicile of an individual is considered the place which is usually chosen for living, by that individual. An individual may have several places of domicile.”⁴⁸

According to the Tax Code of Georgia:

“A place of domicile of an individual is considered the place which is usually chosen for living, by that individual, as well as his factual placement”.⁴⁹ “Factual placement of an individual, who is regularly displaced because of his work, is considered the place where he factually lives or is registered according to the relevant rules of registration.”⁵⁰

Under the Civil Code:

⁴⁷ See, Article 8, PIL Act of Georgia;

⁴⁸ See, Article 20(1), Civil Code of Georgia;

⁴⁹ See, Article 35(1), Tax Code of Georgia;

⁵⁰ See, Article 35(4), Tax Code of Georgia;

“A place of residence of a legal entity is considered the place of location of its administration. A legal entity may have only one place of residence (legal address). Other place would be considered as the place of residence of its branch.”⁵¹

If analyze the aforesaid provisions, it can be drawn the following conclusions:

First, the place of registration of an individual can always be regarded as the “factual placement” of that individual, and, hence, as his “place of domicile” (Tax Code, above). However, individual’s place of domicile is not always his place of registration (Civil Code, Tax Code).

Second, place where an individual factually lives is always his “place of domicile” (Civil Code, Tax Code), but the place of domicile is not always the place where an individual factually lives (in other words, place of domicile might be also a place of registration where an individual has simply been registered but does not live; Tax Code). The decision on whether the individual factually lives on a specific place is the subject of separate assessment in every concrete case.

And third, a place of residence of a legal entity is to be considered his legal address. The other places are considered as the places of residence of its branch (Civil Code). Under national procedural rules, a legal address is given to a legal entity in the process of its registration.

One way or another, the exact definitions of terms - defendant’s “place of domicile”, “place of residence” and “habitual placement” - of PIL Act is ambiguous. Neither the author of this paper has the precise answer.

PIL Act of Georgia, besides the aforesaid provision on jurisdiction mentioned in the beginning of this sub-chapter, provides also additional occasions under which a litigation, and among them that of maritime character, may be brought for judging to Georgian courts. In particular, Georgian courts have international competence in addition when:

- the litigation in question involves number of defendants (two or more) and one of the defendants is domiciled or has place of residence or habitual placement in Georgia; or

⁵¹ See, Article 26, Civil Code of Georgia;

- the litigation is related to the branch of that company which has the place of residence in Georgia;⁵² (Obviously, the wording “litigation is related” is likewise ambiguous because it might mean as the litigation is related to a lawful obligation of the branch, as litigation is related to the right on claim for the branch’s parent body, etc. Clear answer is not found on this question as well.).

And finally, again, besides the aforesaid regulations of PIL Act discussed in this sub-chapter, Georgian courts may have jurisdiction additionally over the claims raised on reliance of Hamburg Rules and PAL 1974. As already mentioned, the aspects of jurisdiction of those two conventions will be discussed below.

Consequently, Georgian domestic legislation gives partly clear partly equivocal determination of Georgian court’s international competence on private maritime litigations and among them those of engaging claims on request of performance of lawful obligations. This is a legal gap of national law, which must be quickly eradicated. Otherwise, the persons of marine legal relations willing to sue court proceedings will face the trouble of selecting the proper venue of action. It is also a risk that they become “victims” of concurrent jurisdiction between a court of Georgia and that of an EU Member State.

2.3 Jurisdiction of EU Member States’

Courts under Brussels I

2.3.1 General Approach of Brussels I

General approach of Brussels I is that:

⁵² See, Article 9, PIL Act of Georgia;

- A plaintiff should sue a claim in the courts of that EU Member State where the defendant is domiciled; (nationality of the defendant is not taken into consideration);⁵³
- But if a defendant is not domiciled in either EU Member State, than the jurisdiction of the courts of each EU State is determined by its national legislation.⁵⁴

That approach of the Regulation is derived from its rules of “general jurisdiction” provided in Section I of Chapter II (Articles 2-4) and is applicable not only for claims of request of performance lawful obligations, but also to defining the action venue in tort or contract-based litigations.

It is notable that aforementioned rules of Brussels I apply at all the existence of an international element.⁵⁵ In other words, they are similarly applicable in proceedings where the parties before the courts of an EU Member State are domiciled in that State and the litigation between them has certain connections with a third non-EU state.⁵⁶ The involvement of an EU Member State and a non-Member State, for example because the claimant and one defendant are domiciled in the first State and the events at issue occurred in the second, makes the legal relationship at issue international in nature.⁵⁷ That situation is such as to raise questions in the EU State relating to the determination of international jurisdiction, which is precisely one of the objectives of the Brussels I Regulation.⁵⁸

Clearly, if adjust the aforesaid to private marine litigations involving Georgian and EU elements, it would be obvious that in order that the concrete EU Member State’s court hear the concrete marine case, it is not urgently necessary that both the claimant and the respondent were domiciled in European Union or all the elements of the litigation in question were connected to the EU, but factor of only respondent’s domicile in the European Union (in particular, in the Member State where the claim is brought) is already sufficient.

⁵³ See, Article 1(1), Brussels I Regulation;

⁵⁴ See, Article 4(1), Brussels I Regulation;

⁵⁵ See, ECJ Judgment on Case C-281/02, 1 March 2005, paragraph 25;

⁵⁶ See, ECJ Judgment on Case C-281/02, 1 March 2005, paragraph 35 and Summary of the Judgment;

⁵⁷ See, ECJ Judgment on Case C-281/02, 1 March 2005, paragraph 26;

⁵⁸ See, ECJ Judgment on Case C-281/02, 1 March 2005, paragraph 26;

With respect to the situations when a defendant is not domiciled in the European Union, in such occasions application of the national rules on jurisdiction rather than the uniform rules of Brussels I is possible only if the court seized of the case holds firm evidence to support the conclusion that the defendant is in fact domiciled outside the European Union.⁵⁹ In the absence of such firm evidence, the international jurisdiction of a court of an EU State is established by virtue of Brussels I Regulation and saved for that the conditions for application of one of the rules of jurisdiction laid down by the Regulation are met.⁶⁰

That means that in every concrete case, the authority of determining the defendant's domicile place lies on the domestic court (the court of an EU Member State) potentially will hear the action, which must investigate the question with due diligence and strengthen the decision on jurisdiction with strong evidence.

Here, it should also be pointed that, in the process of defining the respondent's domicile place, for such definition it should be applied the rules of internal law of that EU State where the action has been brought.⁶¹ But if a respondent is not domiciled in the Member State whose courts are seized of the matter, then, in order to determine whether the respondent is domiciled in another Member State, the court shall apply the law of the latter (of the another Member State).⁶² Anyway, the Regulation still provides some special rules in regard to the determination of certain persons' domicile place, in particular of legal entities. Under Brussels I, a company or other legal person or association of natural or legal persons is supposed domiciled at the place where it has its: statutory seat, central administration, or principal place of business.⁶³ With this respect, for the United Kingdom and Ireland "statutory seat" means:

- the registered office; or
- where there is no such office anywhere, the place of incorporation; or
- where there is no such place anywhere, the place under the law of which the formation took place.⁶⁴

⁵⁹ See, ECJ Judgment on Case C-292/10, 15 March 2012, paragraph 40;

⁶⁰ See, ECJ Judgment on Case C-292/10, 15 March 2012, paragraph 41;

⁶¹ See, Article 59(1), Brussels I Regulation;

⁶² See, Article 59(2), Brussels I Regulation;

⁶³ See, Article 60(1), Brussels I Regulation;

⁶⁴ See, Article 60(2), Brussels I Regulation;

To this end, according to the general approach of Brussels I on defining the jurisdiction of EU Member States courts, the plaintiff of a litigation related to request of performance of maritime lawful obligations can sue a claim in the court of that EU State where the defendant has statutory seat, central administration, principal place of business or otherwise is domiciled in that EU Member State. However, this rule is derogated when the defendant is not the domicile of the European Union.

2.3.2 Complements to General Approach of Brussels I

In spite of the fact that, under general approach (above) of Brussels I, a venue of action is primarily attributed to that EU State where the defendant is domiciled, in some specific occasions a plaintiff can choose, besides the defendant's domicile place, to claim as well as at the other EU Member States' courts. With this respect, the Regulation envisages several complementing norms, which will be brought below. However, in the beginning it should be noted, that, one way or another, such complementing rules of Brussels I applies only if the defendant is domiciled in the European Union (except from with actions relating to limitation of liability from use or operation of a ship; see, below).⁶⁵

One of the types of the mentioned complementing norms is linked to litigations arising out of the operations of the branch, agency or establishment of a person (company). In this connection, Brussels I provides that a claim against such person, may be brought to that EU Member State in which his branch, agency or establishment is situated even if the said person himself is not domiciled in that State.⁶⁶

The second example of complementation to the general approach of Brussels I is the rule of jurisdiction on disputes when an injured party (requesting from defendant to perform his lawful obligations) takes a direct action versus the marine insurer (it is implied the liability insurer). In such situation the injured party is allowed to bring proceedings against the liability insurer:

- in that EU State where the injured party is intending to sue the insured;⁶⁷ or

⁶⁵ See, first indent of Article 5, as well as Articles 7 and 8, Brussels I Regulation;

⁶⁶ See, Article 5(5), Brussels I Regulation;

⁶⁷ See, Article 11(1), Brussels I Regulation;

- in that EU State where the insured has given occurrence the harmful event (which is subject to insurance agreement between the insured and insurer).⁶⁸ (Certainly, for bringing the direct actions in the mentioned EU States, it is also necessary that the domestic law of the forum State permits direct actions at all.⁶⁹).

The next occasion of complementary jurisdiction is relating claims on payment of remuneration in respect of salvage of a cargo or of freight, at sea. Brussels I directly provides that such actions can be brought to the court under the authority of which the cargo or freight has been arrested to secure the payment (or could have been so arrested, but bail or other security has been given), saved for that it is claimed that the defendant has an interest in the cargo or freight or had such an interest at the time of salvage.⁷⁰

And finally, with respect to the claims for limitation of lawful liability from the use or operation of a ship, Brussels I additionally throws such claims into the jurisdiction of that EU Member State's court where the action itself on the liability is heard.⁷¹

To this end, Brussels I, besides the *defendant's forum domicili* principle, further gives the certain range of complementary regulations which enable a claimant to take an action in different venues inside the EU, in taking into consideration the essence and nature of the litigation at issue. Respectively, a plaintiff, while the claim concerns with the request of fulfillment of maritime lawful obligation, can choose to claim whether in the court of the defendant's domicile EU State or in another EU country as it is provided by the aforesaid complementing rules of the Regulation. Clearly, such broadening of the optional area is stipulated by the aim of the Brussels I to provide the flexible system of forum designation and avoid the obstacles for the dispute parties in litigation process.

2.4 Jurisdiction under Hamburg Rules

⁶⁸ See, Articles 11(2) and 10, Brussels I Regulation;

⁶⁹ See, Articles 11(1) and 11(2), Brussels I Regulation;

⁷⁰ See, Article 5(7), Brussels I Regulation;

⁷¹ See, Article 7, Brussels I Regulation;

As referred in Chapter 1.4, Georgia and several EU Member States are bound by the convention of Hamburg Rules and make its provisions valid for the courts of the Contracting States. On the other hand, the Convention itself gives the courts of its contracting countries rules of jurisdiction in addition to those claims which are not falling into their (court's) jurisdictional area in accordance with Brussels I and national legislations.

Article 21 of Hamburg Rules convention regulates the issue of venue of action when disputes are linked to carriage of goods by sea of those legal relations which are set on the ground of the Convention. Respectively, this means that the parties to a dispute, in bringing a claim on performance of lawful obligations, can rely on jurisdictional provisions of Hamburg Rules only if the claim is based on the request of performance of the norms of exactly the Convention and not on the fulfillment of lawful obligations derived from any other mandatory law.

With respect to the circle of private persons (plaintiffs and defendants) to which the Convention is applicable, under Hamburg Rules it is determined broadly, in the following manner:

“The provisions of this Convention [Hamburg Rules] are applicable without regard to the nationality of the ship, the carrier, the actual carrier, the shipper, the consignee or any other interested person.”⁷²

Regarding to venue of action, under Hamburg Rules, in matters relating to claims on performance of Conventional obligations, it can be: (a)

- the principal place of business or, in the absence thereof, the habitual residence of the defendant; or
- the port of loading or the port of discharge of goods of carriage.⁷³

A plaintiff has an option to choose whether at which of the aforesaid places he institutes an action.⁷⁴

⁷² See, Article 2(2), Hamburg Rules;

⁷³ See, Articles 21(1)(a) and 21(1)(c), Hamburg Rules;

⁷⁴ See, first indent of Article 21(1), Hamburg Rules;

And finally, it should be also pointed that the above-mentioned rules on jurisdiction of Hamburg Rules apply to not only to the claims which request the performance of the Conventional provisions from the defendant, but also to all actions related to any Convention-based (based on the Hamburg Rules) liability of the defendant (including contractual liabilities or the other).

2.5 Jurisdiction under PAL 1974

Convention of PAL 1974 regulates the relations of international carriage of passengers and their luggage by sea. In defining the court jurisdiction in non-contract based litigations with claims on request of performance of its (PAL 1974) provisions, PAL 1974 is applicable for all litigations if they are derived from the carriage by that ship which flies the flag of or is registered in a State Party to the Convention.⁷⁵

Notwithstanding, PAL 1974 is not applied:

- when the carriage is subject to a civil liability regime, under any other international convention concerning the carriage of passengers or luggage by another mode of transport; and
- Simultaneously, the said “other convention” has mandatory application to carriage by sea.⁷⁶

(Clearly, above, in the phrase “any other international convention” it is not implied Brussels I Regulation in the sense of application to court jurisdictional matters, because Brussels I is the EU internal regulatory act and not “international convention”).

According to PAL 1974, a plaintiff, at his option, may bring an action on the performance of defendant’s Conventional obligations to the domestic court of that Contracting State in which:

- the place of permanent residence or principal place of business of the defendant is; or

⁷⁵ See, Article 2(1)(a), PAL 1974;

⁷⁶ See, Article 2(2), PAL 1974;

- the domicile or permanent residence of the claimant is; (in this last case the claim can be brought if, at the same time, in the action State the defendant has a place of business and is subject to jurisdiction in that State);⁷⁷

Likewise the Hamburg Rules, the abovementioned rules of jurisdiction of PAL 1974 is applicable also to contract-based or other type maritime claims, and not only to those which request the performance of Conventional obligations beyond the contract.

Chapter 3

Jurisdiction on Litigations Derived from Contractual Obligations

3.1. Categories of Contracts in Maritime Relations

Before starting the discussions of jurisdictional issues in litigations derived from contractual relations in maritime relations, it is worth to categorize and briefly describe the essence and content of most types of contracts are, in practice, concluded in private

⁷⁷ See, Articles 17(1)(a) and 17(1)(c), PAL 1974;

maritime sphere. This will assist in discussions on court jurisdiction below in this chapter, because the venue of action in disputes of contractual relations is frequently determined according to a contract's type and content.

Contracts in practice basically utilized in marine relations may be categorized in the following manner:⁷⁸

- **Service contracts (contracts on providing service):** one of the extensively applied agreements. Under this category it can be unified: the charter parties (excluding bareboat charter parties), contracts on carriage of general cargo, contracts on carriage of passengers, salvage and towage agreements, ship repair contracts, ship agency contracts, contracts on crew management service (service for providing the bring-up of the proper crew for a ship);
- **Employment contracts:** contracts on employment between the employer (mostly a shipowner) and crew members; employment contracts of security guards on vessel;
- **Insurance contracts:** ship insurance contracts, cargo insurance contracts, liability insurance contracts;
- **Sales of goods contracts:** bunker contracts on sale of fuel for a ship;
- **Ship-hiring contracts:** bareboat charter parties.

That list and categories of contracts is the most part of the agreements used in connection to maritime legal relations. Below, the discussions will be held on court jurisdiction in regard to litigations derived with respect to the breach or fulfillment of the aforesaid types of agreements (contracts).

3.2 Jurisdiction of EU Member States'

Courts under Brussels I

3.2.1 Common Approach of Brussels I to Jurisdiction on Contractual Litigations

⁷⁸ See, BIMCO documents (sample copies of maritime contracts) at: [<https://www.bimco.org/>];

In relation to the litigations derived from the breach of or request of performance of contractual obligations, the Brussels I sets forth the rules of special jurisdiction and gives the plaintiff the option to sue the defendant at as well as other EU Member States' court rather than strictly only at the court of the defendant's domicile country. The general provisions of regulating this matter lay down in Article 5(1) of Brussels I.

Under Article 5(1), in matters relating to a contract a claimant can sue the defendant in the court of that Member State where the place of performance of the contractual obligation in question is/was.⁷⁹ Here, at the same time, it should be pointed that, in order that the given court have jurisdiction via Article 5(1), the defendant at case, simultaneously, must have the domicile place in the European Union.⁸⁰

As the European Court of Justice stated, “cases of special jurisdiction [and among them those of contractual litigations], the choice of which is a matter for the plaintiff, are based on the existence of a particularly close connecting factor between the dispute and courts other than those of the defendant's domicile, which justifies the attribution of jurisdiction to those courts for reasons relating to the sound administration of justice and the efficacious conduct of proceedings.”⁸¹ Clearly, in regard to contractual disputes' jurisdiction, the Regulation follows the *forum connexitatis* principle that is motivated to promote the effective realization of justice and to maximally possibly simplify the access to court. The same concerns with the litigations derived from agreements used in maritime sphere. In the following sub-chapters, it will be discussed the elements and specifications of jurisdictional issues of such litigations.

3.2.2 Matters Relating to a Contract

One of the elements of special jurisdiction on contractual litigations, under Brussels I, is the requirement that the matter of a dispute be related to the contract. The concept of “matters relating to a contract” is not an issue of factual assessment of each concrete

⁷⁹ See, Article 5(1), Brussels I Regulation;

⁸⁰ See, first indent of Article 5, Brussels I Regulation;

⁸¹ See, ECJ Judgment on Case C-220/88, 11 January 1990, paragraph 17; See also, ECJ Judgment on Case 21/76, 30 November 1976, paragraphs 10-11; See also, ECJ Judgment on Case C-68/93, 7 March 1995, paragraph 19; See also, ECJ Judgment on Case C-364/93, 19 September 1995, paragraph 10;

situation, but is the subject to specific interpretation of the EU authorities (and primarily of the ECJ), which is clearly derived from the case law of the European Court of Justice:

“[The concept of “matters relating to a contract” in Article 5(1) of the Brussels I Regulation] should not be interpreted simply as referring to the national law of one or other of the Member States concerned, [...] [but] the concept [...] should be regarded as an independent concept which, for the purposes of the application of the Convention [Regulation], must be interpreted by reference chiefly to the system and objectives of the Convention [of the Regulation], in order to ensure that it is fully effective.”⁸²

Consequently, if any EU State’s domestic court or a Georgian one, in its original way, defines the said concept, the definition in question will not be regarded as proper for the scope of the Regulation, and the problem of concurrent jurisdiction might face.

In connection with the scope of “matters relating to a contract”, ECJ held:

“[...] the phrase “matters relating to a contract” [...] is not to be understood as covering a situation in which there is no obligation freely assumed by one party towards another.”⁸³

That citing of the Court can be more clearly understood from the following wording about the relation of a sub-buyer and a manufacturer:

“[...] Article 5(1) of the Convention [of Brussels I Regulation] is to be understood as meaning that it does not apply to an action between a sub-buyer of goods and the manufacturer, who is not the seller, relating to defects in those goods or to their unsuitability for their intended purpose.”⁸⁴

⁸² See, ECJ Judgment on Case 34/82, 22 March 1983, paragraphs 9-10;

⁸³ See, ECJ Judgment on Case C-26/91, 17 June 1992, paragraph 15;

⁸⁴ See, ECJ Judgment on Case C-26/91, 17 June 1992, paragraph 21;

Moreover, in relation to disputes on the basis of a bill of lading in sea carriage, ECJ declared:

“[...] an action by which the consignee of goods found to be damaged on completion of a transport operation by sea and then by land, or by which his insurer who has been subrogated to his rights after compensating him, seeks redress for the damage suffered, relying on the bill of lading covering the maritime transport, not against the person who issued that document on his headed paper but against the person whom the plaintiff considered to be the actual maritime carrier, falls within the scope not of matters relating to a contract within the meaning of Article 5(1) of the Convention [of the Regulation] [since the bill of lading in question does not disclose any contractual relationship freely entered into between the consignee and the defendant] [...].”⁸⁵ (Such an action is a matter relating to tort, delict or quasi-delict within the meaning of Article 5(3) of the Regulation.⁸⁶).

The Court concerned also with the disputes being raised from the infringement of good-faith principle in pre-contractual relations and stated:

“[...] in circumstances [...] characterised by the absence of obligations freely assumed by one party towards another on the occasion of negotiations with a view to the formation of a contract and by a possible breach of rules of law, in particular the rule which requires the parties to act in good faith in such negotiations, an action founded on the pre-contractual liability of the defendant is a matter relating to tort, delict or quasi-delict within the meaning of Article 5(3) of the Brussels Convention [Brussels I Regulation].”⁸⁷

Obviously, from the foregoing judgments it can be concluded the following:

⁸⁵ See, ECJ Judgment on Case C-51/97, 27 October 1998, paragraphs 26 and 19;

⁸⁶ See, ECJ Judgment on Case C-51/97, 27 October 1998, paragraphs 24 and 26;

⁸⁷ See, ECJ Judgment on Case C-334/00, 17 September 2002, paragraph 27;

In order that marine litigations be considered as having matters relating to a contract and come under the scope of Article 5(1), Brussels I Regulation:

- First, the litigation at issue must have been raised from a concrete and ultimately concluded contract;
- Second, the subject of the litigation must have been derived directly from that contract;
- Third, the claim must have been constructed on the probable violation or request of fulfillment of a provision of that contract; and
- Fourth, both the plaintiff and defendant of the litigation must have been the direct parties of that contract.

Else, the question of jurisdiction should be decided in accordance with other provisions of Brussels I.

It is notable that in maritime contractual relations parties to the contract might put the following wording into their agreement: “The rights and obligations between the parties of this contract are subject to X law/X convention/X rules, etc.” In such situation, question is raised: whether the breach of the provisions of such “X law” (convention, rules) is the matter relating to the contract in question or is simply a breach of lawful obligation. This regarding, it should be considered that the jurisdiction on disputes derived from such breaches must fall into Article 5(1), Brussels I. The argument of this is that, in the given occasions, the provisions of the specific law (convention, rules, etc.) are becoming the inclusive part of the concrete contract. Consequently, their violation should be perceived as the violation, primarily, of the contract, and the case must be caught by Article 5(1).

And, the last issue of the concept of “matters relating to a contract” is whether the dispute on **existence** of the contract falls into Article 5(1). The answer on this question can be found again in ECJ case law:

“In the cases provided for in Article 5(1) of the Convention [of the Brussels I Regulation], the national court’s jurisdiction to determine questions relating to a contract includes the power to consider the existence of the constituent parts of the contract itself, since that is indispensable in order to enable the national court in which proceedings are brought to examine

whether it has jurisdiction under the Convention [the Regulation]. [...] Therefore, [...] the plaintiff may invoke the jurisdiction of the courts of the place of performance in accordance with Article 5(1) the Convention [...] [of the Regulation], even when the existence of the contract on which the claim is based is in dispute between the parties.”⁸⁸

Consequently, litigation about the existence of a marine contract should also be included in the concept of “matters relating to a contract” and, respectively, the jurisdiction on such a dispute can come into ambit of Article 5(1).

3.2.3 Place of Performance of Contractual Obligation

The next question in connection with Article 5(1) of Brussels I is the method of determination of the place of performance of contractual obligations (PPCO) for each concrete case. The considerations on PPCO partly are provided in the wording of Brussels I, whereas some part of it is contained in ECJ case law.

In terms of PPCO, Brussels I Regulation divides contracts in three parts and states that:

- for contracts of sales of goods, the PPCO is the place of delivery of goods - first indent of Article 5(1)(b). Such types of contracts in maritime relations might be, for instance, bunker contracts on sale of fuel for a ship;⁸⁹
- for contracts on provision of service, the PPCO is the place where, under contract, the service were provided or should have been provided - second indent of Article 5(1)(b). (For example, contracts on carriage of passengers);
- for other types of contracts, the PPCO is decided on the basis of general implication of PPCO contained into Article 5(1)(a).⁹⁰ (For instance, bareboat charter parties⁹¹).

⁸⁸ See, ECJ Judgment on Case 38/81, 4 March 1982, paragraphs 7-8;

⁸⁹ See, for example, BIMCO Standard Bunker Contract;

⁹⁰ See, Article 5(1)(c), Brussels I Regulation;

⁹¹ See, for Example, BIMCO Standard Bareboat Charter “Barecon 2001”;

However, the interpreting and determining of PPCO in every concrete case is not simple process, which is proved by several cases heard at the European Court of Justice. Consequently, the subsequent sentences of this sub-chapter will be holding on ECJ's approaches.

Unlike to the phrase of "matters relating to a contract", in determining the "place of performance of the obligation" the ECJ gave a portion of margin of assessment to national courts and stated:

*"[...] on several occasions [...] the place of performance of the obligation in question is to be determined by the law governing that obligation according to the conflict rules of the court seised."*⁹²

However, as is derived from that judgment, the mentioned margin of determination for domestic courts is confined only with "several occasions", which implies that, in any case, the final competence of interpretation of the term "place of performance" in Article 5(1) always lays on the ECJ. Respectively, it can be held that the courts of the EU non-member states, including Georgian ones, in the process of deciding the venue of action regarding maritime contractual litigations, might have some room of defining the place of performance of the specific obligation under contract, nevertheless, if such room leads beyond the scope of Brussels I, the risk of collision and concurrent jurisdiction will stand posing.

In connection with the method of defining of the place of performance of a contractual obligation, the ECJ ruled down:

"[...] the rule of special jurisdiction set out in Article 5(1) of [...] [Brussels I Regulation in matters relating to a contract, which complements the rule that jurisdiction is generally based on the defendant's domicile, reflects an objective of proximity and the reason for that rule is the existence of a close link between the contract and the court called upon to hear and determine

⁹² See, ECJ Judgment on Case C-420/97, 5 October 1999, paragraph 33; See also, ECJ Judgment on Case C-440/97, 28 September 1999, paragraph 32; See also, ECJ Judgment on Case 12/76, 6 October 1976, paragraph 13; See also, ECJ Judgment on Case C-288/92, 29 June 1994, paragraph 26;

the case. [...] Consequently, where there are several places at which services are provided in different Member States, it is also necessary to identify the place with the closest linking factor between the contract in question and the court having jurisdiction, in particular the place where, pursuant to that contract, the main provision of services is to be carried out.”⁹³

The “place with the closest link factor” (from the aforementioned judgment) in certain contracts of carriage of goods or of passengers by sea can be understood on reliance of the following example of the ECJ’s another judgment concluded by the Court in relation to aircraft service:

“[...]The services the provision of which corresponds to the performance of obligations arising from a contract to transport passengers by air are the checking-in and boarding of passengers, the on-board reception of those passengers at the place of take-off agreed in the transport contract in question, the departure of the aircraft at the scheduled time, the transport of the passengers and their luggage from the place of departure to the place of arrival, the care of passengers during the flight, and, finally, the disembarkation of the passengers in conditions of safety at the place of landing and at the time scheduled in that contract. From that point of view, places where the aircraft may stop over also do not have a sufficient link to the essential nature of the services resulting from that contract.

[...] The only places which have a direct link to those services, provided in performance of obligations linked to the subject-matter of the contract, are those of the departure and arrival of the aircraft, since the words “places of departure and arrival” must be understood as agreed in the contract of

⁹³ See, ECJ Judgment on Case C-204/08, 9 July 2009, paragraphs 32 and 38; See also, ECJ Judgment on Case C-386/05, 3 May 2007, paragraph 22;

carriage in question, made with one sole airline which is the operating carrier.

[...] It must, however, be pointed out in that regard that, unlike deliveries of goods to different locations, which are distinct and quantifiable operations for the purpose of determining the principal delivery on the basis of economic criteria, air transport consists, by its very nature, of services provided in an indivisible and identical manner from the place of departure to that of arrival of the aircraft, with the result that a separate part of the service which is the principal service, which is to be provided in a specific place, cannot be distinguished in such cases on the basis of an economic criterion.

[...] In those circumstances, both the place of arrival and the place of departure of the aircraft must be considered, in the same respect, as the place of provision of the services which are the subject of an air transport contract.

[...] the second indent of Article 5(1)(b) of Regulation [...] must be interpreted as meaning that, in the case of air transport of passengers from one Member State to another Member State, carried out on the basis of a contract with only one airline, which is the operating carrier, the court [...] [has] jurisdiction [...] at the applicant's choice, which has territorial jurisdiction over the place of departure or place of arrival of the aircraft, as those places are agreed in that contract.”⁹⁴

Consequently, if going through the analogy along the above-brought cases, certain marine contracts might have the place of close link to the venues as follow:

In carriage of passengers contracts, PPCO should be the agreed place of boarding of passengers on the ship and the agreed place of arrival. Under the Brussels I, both of such

⁹⁴ See, ECJ Judgment on Case C-204/08, 9 July 2009, paragraphs 40-43, 47;

places might be regarded as the place of provision of the services which are the subject of the contract in question, and, hence both places are to be supposed as place of performance of the carriage contract. Respectively, there are two choices for the plaintiff to decide where to bring his action.

In carriage of cargo contracts, the question is slightly different. Here, the places of loading of cargo and the places of their delivery may vary, if the cargo is split in two or more parts and the pick-up and hand-on places are several. In such a situation, the Regulation does not provide the exact “recipe” of deciding the action venue, but the question becomes the target of factual assessment. That is to say, the dispute hearing court should, on the basis of economic criteria, decide the place of principle delivery of the goods and thus determine the venue of claim.

And finally, it is also to point that the agreements on carriage of cargo by sea should not be mixed in sales of goods contracts envisaged by first indent of Article 5(1)(b). Sales contract is different from carriage contracts from the viewpoint that the former is purely a sales agreement on the concrete product, enclosed with the provisions of delivery of that product, whereas the latter, that is, cargo carriage contract is the agreement only on service - to send already sold or bought goods to a specific place by a marine vessel. In other words, the carriage of goods contracts fits to the second indent of Article 5(1)(b) (jurisdiction on service contracts) and not to the first indent of Article 5(1)(b).

3.2.4 Jurisdiction on Litigations Related to Breach of Multiple Contractual Obligations

In practice it is frequently when a specific court dispute derived from a contract, unifies the claims on breaches (or on request for performance) on two or more contractual obligations. Respectively, there is a question: where is the action venue, if the places of performance of such different obligations are distinguished?

In connection to Brussels I Regulation, the European Court of Justice partly answered that question in the following manner:

“[...] when a dispute relates to a number of obligations of equal rank arising from the same contract, the court before which the matter is brought cannot, when determining whether it has jurisdiction, be guided by the maxim accessorium sequitur principale [...].

[...] The same court does not therefore have jurisdiction to hear the whole of an action founded on two obligations of equal rank arising from the same contract when, according to the conflict rules of the State where that court is situated, one of those obligations is to be performed in that State and the other in another [...] State.

[...] It should be remembered that, while there are disadvantages in having different courts ruling on different aspects of the same dispute, the plaintiff always has the option, under Article 2 of the Convention [of the Regulation], of bringing his entire claim before the courts for the place where the defendant is domiciled.”⁹⁵

To this end, while there is dispute on two or more (multiple) contractual obligations of equal rank, the venue of action is defined under Article 2 and not according to Article 5(1), of Brussels I.

However, here is another question: what, if the disputed contractual obligations are not ranked equally and one of them (obligation) has the priority to another, that is to say, one is principal and the second is minor? The direct answer on that question is not found. Though, if taking into consideration the ECJ's practice and its approaches referred above, it can be concluded that in the case of non-equal obligations, the venue of action should be decided also under Article 2. This is true by the following argument:

One of the goals of contractual relations is that a contract must be performed in full. The aim of the pre-contractual negotiations is, amongst others, to detail all of the provisions of a future contract - both the principal provisions and the minor ones. This implies that from the legal perspective, all of the clauses of a contract must be fulfilled in full. The

⁹⁵ See, ECJ Judgment on Case C-420/97, 5 October 1999, paragraphs 39-41;

categorization of contractual provisions into main and secondary clauses is purely technical and not of in essence. Both types of such clauses always have the equal weight in terms of legal viewpoint of performing. Consequently, when a question is raised, it can not be surely say which provision of the contract at issue weighs more, that is to say, which is highly or lowly ranked, because the court must grant the full reparation to the “victim” party for each infringement of contract clauses.

Respectively, while deciding the jurisdictional aspects of the litigation being raised from two or more unequally ranked contractual obligations, the Brussels I Regulation should be applied in the same manner as is applied with the equally ranked obligations.

To this end, under Brussels I, maritime litigations relating to multiple contractual obligations should be heard in that EU Member State which is determined by Article 2 (Brussels I Regulation), that is to say, at the place of domicile of the defendant.

3.2.5 Additional Specifications of Jurisdiction on Disputes Derived from Employment Contracts

With respect to disputes derived from employment contracts, Brussels I, besides Article 5(1) provides the supplementary regulations on court jurisdiction for such contracts as is provided in its Section 5 of Chapter II. In particular, an employer, if he is domiciled in the European Union, may be sued by the employee, at the employee’s option, in the venues as follow:

- in the courts of the employer’s domicile Member State;⁹⁶ or
- in the courts of that Member State where the employee habitually carries out his work or in the courts for the last place (EU State) where he did so. If the employee does not or did not habitually carry out his work in any one EU country, then the venue of action will be the place (EU State) where the business which engaged the employee is or was situated.⁹⁷

⁹⁶ See, Article 19(1), Brussels I Regulation;

⁹⁷ See, Article 19(2), Brussels I Regulation;

Above, it was mentioned the term “the place where the employee habitually carries out his work”. One may ask: what is implied in “habitual work”? The European Court of Justice has given its interpretation on the term; however, before discussing the ECJ’s rulings, it should be mentioned one important detail. In particular, in the judgments cited below, the reader will notice that in relation to interpreting the phrase, the Court gave the falling to the litigations on employment contracts into the ambit of Article 5(1) (general rules on jurisdiction on disputes derived from contracts). Clearly, if taking this into consideration, it should be concluded that employment agreements theme for Brussels I Regulation is not solely separate subject to Section 5, Chapter II, but they are topics also of Article 5(1). In other words, the contractor of the employment contract can take an action as under Article 5(1), that is, at the court of the place of performance of the contractual obligation (for example, at place of payment of agreed salary), as under the rules mentioned in the beginning of this sub-chapter (Section 5, Chapter II, Brussels I).

One way or another, regarding an employer, he may bring proceedings against employee only in the court of the EU Member State in which the employee is domiciled.⁹⁸

Now, with respect to the “habitual work” term, the first issue is that ECJ does not leave a room for national courts to interpret this term, and holds:

*“[...] national law applicable to the main dispute has no bearing on the interpretation of the concept of the place where an employee habitually works, within the meaning of Article 5(1) of the convention [of the Regulation] [...]”*⁹⁹

The second question is linked to: which is the place of habitual work of the employee if he carries his contractual work in two or more Member States in parallel way? In this regard, the ECJ gave strict definition and confined the national courts with the following ruling:

⁹⁸ See, Article 20, Brussels I Regulation;

⁹⁹ See, ECJ Judgment on Case C-37/00, 27 February 2002, paragraph 62;

*“[...] Article 5(1) of the Brussels Convention [of the Brussels I Regulation] must be interpreted as meaning that where an employee performs the obligations arising under his contract of employment in several Contracting [Member] States the place where he habitually works, within the meaning of that provision, is the place where, or from which, taking account of all the circumstances of the case, he in fact performs the **essential part** of his duties vis-à-vis his employer.*

*In the case of a contract of employment under which an employee performs for his employer the same activities in more than one Contracting [Member] State, it is necessary, in principle, to take account of the **whole of the duration** of the employment relationship in order to identify the place where the employee habitually works, within the meaning of Article 5(1).*

*Failing other criteria, that will be the place where the employee has **worked the longest**.*

*It will only be otherwise if, in light of the facts of the case, the subject-matter of the dispute is **more closely connected** with a different place of work, which would, in that case, be the relevant place for the purposes of applying Article 5(1) of the Brussels Convention [of the Brussels I Regulation].”¹⁰⁰*

In relation to the “essential part” of performing the duties, mentioned in the above-brought judgment, the European Court of Justice said that the reason and motivation of selecting the place of performing of essential part of the work as the habitual work venue is that “that is the place where it is least expensive for the employee to commence proceedings against his employer or to defend himself in such proceedings.”¹⁰¹ However, the author of this paper does not agree with that approach to “habitual work place” as being the “least expensive place”: because to take an action on the venue where an employee

¹⁰⁰ See, ECJ Judgment on Case C-37/00, 27 February 2002, paragraph 58;

¹⁰¹ See, ECJ Judgment on Case C-383/95, 9 January 1997, paragraph 24;

performs the essential part of his work can be as the least expensive as the most expensive - it depends on the public fees and court expenses for hearing the case, as well as on several other factors, and not first and foremost on the fact that an employee fulfils the essential part of his job there.

The Court held also additional ruling for interpreting the “habitual work place”, in addition to the interpretations referred above, and declared:

“[...] Article 5(1) of the Convention [of the Regulation] [...] must be interpreted as meaning that where, in the performance of a contract of employment an employee carries out his work in several Contracting [Member] States, the place where he habitually carries out his work, within the meaning of that provision, is the place where he has established the effective centre of his working activities. When identifying that place, it is necessary to take into account the fact that the employee spends most of his working time in one of the Contracting [Member] States in which he has an office where he organizes his work for his employer and to which he returns after each business trip abroad.”¹⁰²

Besides, the ECJ gave “recipe” of deciding the situations when it is impossible towards a concrete practical fact to define the place where the employee habitually carries out his work:

“In the event that the criteria laid down by the Court of Justice do not enable the national court to identify the habitual place of work, as referred to in Article 5(1) of the Brussels Convention [of the Brussels I Regulation], the employee will have the choice of suing his employer either in the courts for the place where the business which engaged him is situated, or in the courts of the Contracting [Member] State in whose territory the employer is domiciled.”¹⁰³

¹⁰² See, ECJ Judgment on Case C-383/95, 9 January 1997, paragraph 27;

¹⁰³ See, ECJ Judgment on Case C-37/00, 27 February 2002, paragraph 58;

And finally, it is also important to mention the ruling of European Court of Justice on jurisdiction for claims derived from those employment contracts which envisages the fulfillment of work outside the EU territory, for example, in Georgia or in high seas:

“[...] in the case of a contract of employment, the obligation of the employee to carry out the agreed work was performed and has to be performed outside the territory of the Contracting States [of the Member States], [...] in such a case jurisdiction is determined on the basis of the place of the defendant’s domicile in accordance with Article 2 of the Convention [of the Regulation].”¹⁰⁴

To this end, as it is shown from the foregoing, jurisdiction on litigations derived from the marine employment contracts has its specific characteristics and is different from the rules being in connection to the other contractual disputes originated in maritime relations.

3.2.6 Additional Specifications of Jurisdiction on Disputes Derived from Insurance Contracts

Likewise the employment agreements, jurisdiction on litigations derived from insurance contracts is also the separate subject of regulating in Brussels I (Section 3 of Chapter II). Certainly, as a rule, the parties of such litigations are the contractors of an insurance agreement. However, in some occasions, the Regulation concerns also the situations where the claimant is an injured person other than the person who has concluded the concrete insurance contract.¹⁰⁵ The right of such injured third parties to take an action, as usual, flows from the law operating on the specific State’s territory and, hence, disputes to those concerned are not derived exactly and directly from an insurance contract. Thus, in

¹⁰⁴ See, ECJ Judgment on Case 32/88, 15 February 1989, paragraph 22;

¹⁰⁵ See, Article 11, Brussels I Regulation;

this sub-chapter, the discussions will be held only towards the actions brought by policyholder, insured, beneficiary and insurer, that is, direct contractors in the insurance contract. The discussions in connection to injured parties vs. insurers are given above (Chapter 2.3.2).

With respect to identifying the parties to an insurance agreement, Brussels I applies the terms “insurer”, “co-insurer”, “policyholder”, “insured”, and “beneficiary”. In this regard, it should be noted that in marine practice sometimes those terms are subrogated with another ones, though, the meaning are almost the similar. For example, according to the Nordic Marine Insurance Plan, “beneficiary” might be equalized to “assured”, whereas “insured” can be translated as “the person effecting the insurance”.¹⁰⁶ Regarding “a policyholder”, it is the party to an insurance contract as well, provided that the insurer has issued the policy certificate and given it to the insured.

Brussels I enshrines that a claim based on an insurance agreement may be brought to the following venues:

- in the court of the defendants domicile Member State saved for that the defendant is the insurer, policyholder, insured or a beneficiary;¹⁰⁷
- in the court of the plaintiff’s domicile Member State saved for that the plaintiff is a policyholder, insured or a beneficiary;¹⁰⁸
- in the court of the Member State where the harmful event occurred saved for that the litigation is derived from the liability insurance contract and the defendant is the insurer and domiciled in the European Union.¹⁰⁹

Besides, if the insurer is a co-insurer, and the proceedings against the leading insurer have already been brought in some EU State’s court, then such co-insurer can be sued in the same court as well.¹¹⁰

To this end, the claimant of a marine insurance contract has several options pointed above to choose a court of an EU Member State and sue a claim against his contractor.

¹⁰⁶ See, Clause 1-1, Nordic Marine Insurance Plan of 2013;

¹⁰⁷ See, Articles 9(1)(a) and 12(1), Brussels I Regulation;

¹⁰⁸ See, Article 9(1)(b), Brussels I Regulation;

¹⁰⁹ See, Articles 10 and 8, Brussels I Regulation;

¹¹⁰ See, Article 9(1)(c), Brussels I Regulation;

And finally, if follow by analogy to the discussions given in the previous sub-chapter in connection with employment contracts, it could be concluded that the disputes flowing from the marine insurance contracts might be judged as well as in the place where the place of performance of the obligation of the insurance agreement is. The only exception from that rule would be the litigations where the plaintiff is the insurer. With this latter respect, the Regulation gives the strictly confined ruling and says that an insurer may bring proceedings only in the courts of the Member State in which the defendant (insured, policyholder, beneficiary) is domiciled.¹¹¹ Clearly, falling of the jurisdiction on some insurance contracts litigations into the ambit of Article 5(1) of Brussels I seems to be reasonable.

3.3 Jurisdiction of Georgian Courts under Georgian National Legislation

Likewise the approach of Brussels I Regulation, PIL Act of Georgia defines supplementary element for jurisdiction of Georgian courts on disputes derived from the contractual relations. In other words, when a maritime claim concerns with the performance of or recovery of breach of contractual obligation, the claimant may bring the case to Georgian courts if the place of performance of the contractual obligation is in Georgia (even if the place of domicile, residence and habitual placement of the defendant is not in Georgia).¹¹²

With respect to the term of “place of performance” of contractual obligation, it is not defined by PIL Act; however, the “grains” of its determination can be found in the other national legislation of the country.

In particular, the general rule is that the place of fulfilling of an obligation is the agreed place between the contract parties (Civil Code of Georgia).¹¹³ At the same time, the national law, to some extent, gives also the determination of “place of performance” when the place is not agreed.

¹¹¹ See, Article 12(1), Brussels I Regulation;

¹¹² See, Article 9(c), PIL Act of Georgia;

¹¹³ See, Article 361(2), Civil Code of Georgia;

Under the Civil Code of Georgia:

“If the place of performance of the obligation neither is defined nor can be derived from the essence of the obligation, then the supply of articles [goods] shall be accomplished in the following manner: a) if the article is individual, at the place where the article was located at the moment of originating of the obligation; b) if the article is collective, at the place where the debtor’s company is resided; if the latter is not existing then at the place of his [debtor’s] legal address.”¹¹⁴

Besides,

“In case of misleading of the place of performance of a pecuniary obligation, such obligation shall be performed at the place of domicile or legal address of the creditor. If the creditor’s banking account is not at the place or in the country where the payment is to be accomplished then the debtor may transfer the amount to the creditor’s banking account and via this action fulfill his pecuniary obligation, unless the creditor is not against of doing so.”¹¹⁵

If follow the implications of the aforesaid norms, it can be concluded that in case of when a place of performance of a contractual obligation is not agreed, such place should be determined in accordance with the essence of the obligation in question. Moreover, if such “essence” itself is ambiguous, the place of performance should be decided according to the linking factor of the contract subject (goods, article, place of domicile of the debtor, creditor) as shown above.

However, from the aforesaid norms one question is not completely obvious: which place can be regarded as place of performance of the obligation when the issue concerns with fulfillment of service, for instance, carrying of passengers? Is here the venue of

¹¹⁴ See, Article 362, Civil Code of Georgia;

¹¹⁵ See, Article 386, Civil Code of Georgia;

performance of the contract country of departure or country of arrival? The clear answer on this question is not provided in Georgian domestic law.

To this end, Georgian national legislation in defining the jurisdiction of national courts over the claims raised from contracts (and among them from maritime agreements) relies on contract-performance-venue principle, though, some issues are not obvious till the end and necessitate more improvement on the legislative level.

3.4 Jurisdiction under Hamburg Rules and PAL 1974

Hamburg Rules and PAL 1974 provide several rules on court jurisdiction in relation to litigations derived from sea carriage contractual relations. Before focusing on those rules, it is worth to answer the question: what requirements must a sea carriage contract satisfy, in order that the litigation derived from it fall under the scope of jurisdictional rules of those conventions?

With this respect, Hamburg Rules is applicable if:

- the port of loading of cargo, as provided for in the contract, is located in one of the Convention States (State Party to the Hamburg Rules);
- the port of discharge of cargo, as provided for in the contract, is located in one of the Convention States;
- one of the optional ports of discharge provided for in the contract is the actual port of discharge and such port is located in one of the Convention States;
- the bill of lading or other document evidencing the contract is issued in one of the Convention States; or
- the bill of lading or other document evidencing the contract provides that the provisions of Hamburg Rules or the legislation of any Convention State giving effect to them are to govern the contract.¹¹⁶

The provisions of Hamburg Rules, and amongst them those on court jurisdiction over contractual disputes, are applicable without regard to the nationality of the ship, the

¹¹⁶ See, Article 2(1), Hamburg Rules;

carrier, the actual carrier, the shipper, the consignee or any other interested person.¹¹⁷ (See also, above Chapter 2.4)

Nevertheless, Hamburg Rules does not apply to jurisdictional issues on claims derived from charter parties.¹¹⁸

Regarding to PAL 1974, the contracts on carriage of passengers may fall under its scope and thus the venue of action derived from such contracts can be regulated by that Convention, if:

- the contract has been made in a State Party to PAL 1974; or
- the place of departure or destination, according to the contract, is in one of the State Parties to PAL 1974.¹¹⁹
- the carriage subject to the contract is accomplished by a ship which is flying the flag of or is registered in a State Party to PAL 1974;¹²⁰

Norms on venue of action based on contractual litigations in Hamburg Rules is provided in its Article 21. In particular, under that article, in judicial proceedings relating to carriage contract of goods by sea regulated under Hamburg Rules, the plaintiff has an option to choose and institute a claim in one of the following places:

- at the principal place of business or, in the absence thereof, the habitual residence of the defendant;
- at the place where the contract was made, provided that the defendant has there a place of business, branch or agency through which the contract was made; or
- at the place of the port of loading or the port of discharge; as well as at any additional place designated for that purpose in the contract.¹²¹

In regard to PAL 1974, in disputes raised from passenger carriage contracts to which PAL 1974 is applicable, the Convention provides the following choices for a claimant to take an action, that is:

- the place of permanent residence or principal place of business of the defendant;

¹¹⁷ See, Article 2(2), Hamburg Rules;

¹¹⁸ See, Article 2(3), Hamburg Rules;

¹¹⁹ See, Article 2(1), PAL 1974;

¹²⁰ See, Article 2(1), PAL 1974;

¹²¹ See, Article 21(1), Hamburg Rules;

- the place of departure or that of the destination according to the contract of carriage;
- the State (it is implied the State Party to PAL 1974) of the domicile or permanent residence of the claimant, if the defendant has a place of business; and
- the State (it is implied the State Party to PAL 1974) where the contract of carriage was made, if the defendant has a place of business in that State.¹²²

To this end, Hamburg Rules and PAL 1974 allow the claimants in maritime relations to sue an action at several places, whether in Georgia or another EU Member State which at the same time is a state party to those conventions. As it is shown from the foregoing the range of options for a claimant is not narrow. Moreover, this range, in certain aspects, goes beyond the frames of the jurisdictional rules provided by Brussels I Regulation and Georgian national legislation, and gives a plaintiff possibility to sue action at additionally other places (for instance, at venue of concluding of contract - *forum contractus*) rather than this is guaranteed by Brussels I and Georgian domestic law.

Chapter 4

Jurisdiction on Litigations Derived from Tort

Georgian national legislation and Brussels I Regulation provide the additional jurisdiction for correspondingly Georgian and EU Member States' courts on litigations derived from tort (delict, quasi-delict). Regarding to Hamburg Rules and PAL 1974, they do not contain any separate provisions with this respect.

Under Georgian domestic law, the "tort" is defined as the wrongful act which has caused harm (damage) to someone.¹²³ At the same time, by the PIL Act it is provided that a court of Georgia has international competence if the dispute deals with harm (damage) caused by a wrongful act and such act has occurred in Georgia.¹²⁴

Those definitions of national law are common and concern to all kind of marine legal relations, whether those of carriage, employment, insurance or the other. However, in

¹²² See, Article 17(1), PAL 1974;

¹²³ See, Article 992, Civil Code of Georgia;

¹²⁴ See, Article 9(c), PIL Act of Georgia;

the phrase “wrongful act [...] has occurred in Georgia”, it is not entirely clear the place of occurrence of a tort is considered to be whether the place of the starting point of a wrongful act or that of the ending moment of it, or other place somehow linked to the illicit conduct. The respective determinations are not found in the country law.

Regarding to Brussels I Regulation, it in its Article 5(3) provides that: if a person is domiciled in the European Union, in matters relating to tort (delict or quasi-delict), he may be sued in the court of that EU Member State where the harmful effect of such tort (delict, quasi-delict) occurred or may occur.¹²⁵

With this respect, there are several key issues to be discussed in order that the true essence and scope of application in maritime legal relations, of the said norm of Brussels I be clarified.

First of all, it should be mentioned the aim and goal of Article 5(3) as to why the place of occurrence of harmful effect is nominated as possible venue to take an action in tortuous relations. In this connection, ECJ held:

“[...] The rule of special jurisdiction laid down in Article 5(3) of the Brussels Convention [of the Brussels I Regulation] is based on the existence of a particularly close connecting factor between a dispute and the courts for the place where the harmful event occurred [...]. The courts for the place where the harmful event occurred are usually the most appropriate for deciding the case, in particular on the grounds of proximity and ease of taking evidence. Those considerations are equally relevant whether the dispute concerns compensation for damage which has already occurred or relates to an action seeking to prevent the occurrence of damage.”¹²⁶

As it is visible, the main goal of determination a place of tort as the action venue, under Article 5(3), is based on *forum delicti* and *forum conveniens* principles.

¹²⁵ See, Article 5(3), Brussels I Regulation;

¹²⁶ See, ECJ Judgment on Case C-167/00, 1 October 2002, paragraph 46; See also, ECJ Judgment on Case C-189/08, 16 July 2009, paragraph 24; See also, ECJ Judgment on Case 21/76, 30 November 1976, paragraphs 10-11; See also, ECJ Judgment on Case C-220/88, 11 January 1990, paragraph 17; See also, ECJ Judgment on Case C-68/93, 7 March 1995, paragraph 19; See also, ECJ Judgment on Case C-364/93, 19 September 1995, paragraph 10;

In regard to scope of “matters relating to tort” (MRTT) the ECJ gave broad definition and declared that: “[...] the term “matters relating to tort, delict or quasi-delict” within the meaning of Article 5(3) of the Convention [of the Regulation] must be regarded as an independent concept covering all actions which seek to establish the liability of a defendant and which are not related to a “contract” within the meaning of Article 5(1).”¹²⁷

Clearly, the concept of MRTT, as is defined above, should not imply to cover indeed absolutely all actions beyond the contractual relations. In other words, besides the contractual and tortuous litigations, there might be also disputes which are raised in connection with the request of performance of certain lawful duties as is discussed above in Chapter 1. That is to say, claims, which request to defendant that he must fulfill an action derived from a concrete legal act, do not always mean that such a claim is connected whether to tort or to contract. And vice-versa, the tort-based claim does not necessarily imply the request of performance of lawful obligation, but, as usual, is linked to reparation of damages incurred because of tortuous act.

With respect to the examples from ECJ judgments when it (the Court) found “matters relating to tort”, some of them were brought above (Chapter 3.2.2), in particular: when the party of pre-contractual negotiations harms another party, the latter can claim on the basis of tort and not on the bases of breach of contract. As well as: when the consignee of sea carriage goods finds his articles damaged and starts proceedings on the basis of bill of lading not against the person who issued the bill of lading but against the person whom the plaintiff considered to be the actual maritime carrier, such litigation falls into the scope of Article 5(3) (MRTT).

Another aspect of Article 5(3) of Brussels I is the principle of determination of “place of occurrence of a tort (delict, quasi-delict)” (POT). In this regard, ECJ has concluded several judgments and made partly clear of how to define POT. One of the questions where such determination bears an actuality is linked to the situations when the place of tortuous action and the result (damage) of such action are different. With this respect, the Court held that:

¹²⁷ See, ECJ Judgment on Case 189/87, 27 September 1988, paragraph 18;

“[...] where the place in which the event which may give rise to liability in tort, delict or quasi-delict occurs and the place where that event results in damage are not identical, the expression “place where the harmful event occurred” in Article 5(3) of the Brussels Convention [Brussels I Regulation] must be understood as being intended to cover both the place where the damage occurred and the place of the event giving rise to it, so that the defendant may be sued, at the option of the claimant, in the courts for either of those places [...].”¹²⁸

Hence, the maritime claimant can sue tortfeasor in both EU States where the tortuous action started and where it finalized with damages, certainly, in those cases when two places are in different EU countries' territories.

Consequently, Georgian law and Brussels I for respectively Georgian and EU States' courts, design additional rules on jurisdiction on claims requesting the recovery from tortuous acts. A plaintiff in a maritime litigation can, besides when defendant is domiciled or has place of residence or habitual placement in Georgia, bring proceedings for recovery to a Georgian court if the tort has occurred in Georgia. Under Brussels I, he (plaintiff) can choose and bring case whether in the defendant's domicile EU Member State, or in that EU State where the tort has happened but saved for that the defendant is the domicile of the European Union.

¹²⁸ See, ECJ Judgment on Case C-189/08, 16 July 2009, paragraph 23; See also, ECJ Judgment on Case 21/76, 30 November 1976, paragraphs 24-25; See also, ECJ Judgment on Case C-220/88, 11 January 1990, paragraph 10; See also, ECJ Judgment on Case C-68/93, 7 March 1995, paragraph 20; See also, ECJ Judgment on Case C-364/93, 19 September 1995, paragraph 11; See also, ECJ Judgment on Case C-18/02, 5 February 2004, paragraph 40; See also, ECJ Judgment on Case C-168/02, 10 June 2004, paragraph 16;

III. Conclusion

To this end, Georgian and EU Member States' courts have jurisdiction on private international maritime litigations by diversity of linking factors with cases brought before them. Sometimes this is the domicile place of a defendant whereas in other occasions this derives from several other international elements.

The main approach which applies to all kind of marine cases is that a defendant may be sued in that EU Member State where he is domiciled and in Georgia if he has place of domicile or place of residence or habitual placement in Georgia. However, this main approach is complemented with several additional rules of jurisdiction in accordance with the ground of a claim and essence of litigation. With this respect, as it was shown above there are three streams of complementation: jurisdiction on certain claims of requesting the performance of maritime lawful obligations, jurisdiction on disputes based on marine contractual relations and jurisdiction on cases for recovery of tortuous damages. In other words, according to the specific case, a plaintiff in maritime dispute is able to sue the defendant at EU Member State's court or at Georgian one whether when the linking factor

to action venue is the defendant's domiciliation or when the litigation at issue is connected to the forum state with, for example, place of performance of contractual obligation, place of concluding of contract, place of tortious action, etc.

Nevertheless, in maritime sphere there is frequently a situation when the place of performance of obligation or venue of tort (or the like) is inside either country's state boundaries but is in high seas. With this respect the ECJ emphasized the flag state principle of a ship and explained (when he agreed the Danish court in determination the place of occurrence of tort): [...] the nationality of the ship can play a decisive role only if the national court reaches the conclusion that the damage arose on board [...]. In that case, the flag State must necessarily be regarded as the place where the harmful event caused damage.”¹²⁹ One way or another, that judgment can not be used as universal guideline for deciding the jurisdiction on every specific claim related to ship-board cases. First, it is unclear and questionable what is implied in “damage arose on board”: whether it is damage arose only on board or also damage which can be arisen in/on/at a vessel's hull or other part of a ship. Second, in order that nationality of a concrete ship were the decisive factor for determining the state territory of a country, it is to be clearly and unequivocally recognized, under this country's domestic legislation and international agreements, that the territory of the board of the ship or of her other parts are the territory of the flag state (territory of the mentioned country) despite where the ship is situated: in high seas or in another state's territorial waters. Therefore, this issue is subject to purely factual assessment for each concrete maritime dispute and not the subject to general rules. In domestic legislation of Georgia and in the international treaties and agreements, Georgia is a party to, such type of regulations does not exist.

Besides, it should be noted also one detail: sometimes it happens that a claimant brings an application to court and that application contains two or more claims with different characters so that one of them is under the jurisdiction of the given court and another is not. How should the court in question act in such situation? Clearly, the court must not dismiss the entire application, but it should split the application at issue and judge only that part of it which is under its (court's) jurisdiction.

¹²⁹ See, ECJ Judgment on Case C-18/02, 5 February 2004, paragraph 44;

And finally, in spite of the fact that there are different jurisdictional rules whether in Brussels I or Georgian national legislation or Hamburg Rules or PAL 1974, there is one generally accepted principle that: if parties to the litigation, in the designed form, agrees on the specific court's jurisdiction, they should bring the claim to such agreed court (*forum conventionale*).¹³⁰ Hence, the parties of private international maritime relations always should take into consideration, when bringing the marine claim whether in an EU State or Georgia, the fact of existence of agreement on court jurisdiction, because the courts of EU Member States and Georgia, in most cases, have exclusive jurisdiction on the action-venue-agreed litigations.

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3. Constitution of Georgia;
4. Civil Code of Georgia;
5. Code of Civil Procedure of Georgia;
6. Tax Code of Georgia;
7. Law of Georgia on Normative Acts;
8. Law of Georgia on International Treaties;
9. Council Regulation (EC) No. 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and enforcement of Judgments in Civil and Commercial Matters (Brussels I);

¹³⁰ See, Articles 23, 13, 14 and 21, Brussels I Regulation; See also, Article 25, Maritime Code of Georgia; See also, Article 18, PIL Act of Georgia; See also, Article 21(1)(5) and 21(1)(d), Hamburg Rules; See also, Article 17(2), PAL 1974.

10. Agreement of 19 October 2005 between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters;
11. Treaty on European Union;
12. Treaty on the Functioning of the European Union;
13. United Nations Convention of 31 March 1978 on the Carriage of Goods by Sea (Hamburg Rules);
14. Athens Convention of 13 December 1974 Relating to the Carriage of Passengers and their Luggage by Sea as amended by Protocol of 19 November 1976 to the Athens Convention Relating to the Carriage of Passengers and their Luggage by Sea (PAL 1974).

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1. *Reisch Montage AG v Kiesel Baumaschinen Handels GmbH*, Case C-103/05, 13 July 2006;
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3. *Falco Privatstiftung v Thomas Rabitsch*, Case C-533/07, 23 April 2009;
4. *TNT Express Nederland BV v AXA Versicherung AG*, Case C-533/08, 4 May 2010;
5. *Firma E. Merck v Hauptzollamt Hamburg-Jonas*, Case 292/82, 17 November 1983;
6. *Findling Wälzlager Handelsgesellschaft mbH v Hauptzollamt Karlsruhe*, Case C-136/91, 1 April 1993;
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8. *Irène Bogiatzi, married name Ventouras v Deutscher Luftpool and Others*, Case C-301/98, 18 May 2000;
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10. *Commission of the European Communities v Portuguese Republic*, Case C-53/05, 6 July 2006;

11. *Hauptzollamt Hamburg-Jonas v ZVK Zuchtvieh-Kontor GmbH*, Case C-300/05, 23 November 2006;
12. *Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles SA*, Case C-306/05, 7 December 2007;
13. *Bundesverband der Verbraucherzentralen und Verbraucherverbände – Verbraucherzentrale Bundesverband eV v deutsche internet versicherung AG*, Case C-298/07, 16 October 2008;
14. *Dietmar Klarenberg v Ferrotron Technologies GmbH*, Case C-466/07, 12 February 2009;
15. *Irène Bogiatzi, married name Ventouras v Deutscher Luftpool and Others*, Case C-301/08, 22 October 2009;
16. *Christopher Sturgeon and Others v Condor Flugdienst GmbH; Stefan Böck and Cornelia Lepuschitz v Air France SA*, Joined Cases C-402/07 and C-432/07, 19 November 2009;
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22. *G v Cornelius de Visser*, Case C-292/10, 15 March 2012;
23. *Dumez France SA and Tracoba SARL v Hessische Landesbank and others*, Case C-220/88, 11 January 1990;
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31. *Effer SpA v Hans-Joachim Kantner*, Case 38/81, 4 March 1982;
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